Supreme Court, U.S.
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No. 04 644

IN THE

Supreme Court of the United States

EDDIE L. BROOKS,
Petitioner,

v.

GARY R. MCCAUGHTRY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in light of *Godinez v. Moran*, 509 U.S. 389 (1993), and *Faretta v. California*, 422 U.S. 806 (1975), the Seventh Circuit erred in concluding, contrary to the majority of federal appellate courts and state high courts that have addressed this recurring issue, that the Sixth Amendment permits a state criminal court to require a defendant who wishes to represent himself at trial to satisfy a standard of competency higher than the standard of competency to stand trial.

2. Whether, under 28 U.S.C. § 2254, this Court's opinions in *Godinez* and *Faretta* constitute "clearly established Federal law" entitling a convicted criminal defendant to obtain federal collateral relief, where the state criminal court rejected the defendant's request to represent himself at trial by applying a higher standard of competency for self-representation than for standing trial.

PARTIES TO THE PROCEEDING

The parties appearing here and below are (1) Eddie L. Brooks, the petitioner listed in the caption, and (2) Gary R. McCaughtry, Warden at the Waupun (Wisconsin) Correctional Institution.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Eddie L. Brooks ("Brooks") respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The October 6, 1999 judgment of the State of Wisconsin Court of Appeals affirming the trial court's order denying Brooks's postconviction motion for a new trial is unreported. (Pet. App. 19a-25a.) The Supreme Court of Wisconsin's judgment denying Brooks's petition for discretionary review without opinion is reported at 607 N.W.2d 290 (Wis. 1999). (Pet. App. 18a.) The October 28, 2002 decision of the United States District Court for the Eastern District of Wisconsin denying Brooks habeas corpus relief is unreported. (Pet. App. 8a-17a.) The opinion of the United States Court of Appeals for the Seventh Circuit affirming the District Court is reported at 380 F.3d 1009 (7th Cir. 2004) and is reproduced at pages 1a to 7a of the Appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on August 12, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which authorizes this Court to review a judgment of the Seventh Circuit denying a petition for writ of habeas corpus under 28 U.S.C. § 2254.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States and 28 U.S.C. § 2254, which are reproduced at pages 45a to 49a of the Appendix.

STATEMENT OF THE CASE

Petitioner Eddie L. Brooks was convicted of first-degree murder and related crimes in a Wisconsin state court. (Pet. App. 1a.) Before the trial began, the court allowed Brooks to dismiss two attorneys appointed to represent him. (Pet. App. 2a.) With the appointment of the third attorney, the court warned Brooks that were he to dismiss this attorney, he then would have to represent himself. (*Id.*)

Brooks was unhappy with the third attorney, but the court denied this third attorney's motion to withdraw. (*Id.*) As jury *voir dire* commenced, Brooks again moved to dismiss his attorney and again the motion was denied. (*Id.*) Brooks filed a written *pro se* motion to dismiss his attorney after the jury was impaneled and renewed the motion to represent himself before opening arguments. (*Id.*)

A colloquy ensued between Brooks and the trial judge to determine Brooks's competency to represent himself. Brooks stated that he had earned a high school equivalency diploma, and that he understood the charges against him and the possible punishment. Brooks denied responsibility for the crime and also articulated a necessity defense. (Pet. App. 39a.) He listed necessity and the right to self-defense as possible mitigating factors. (Pet. App. 40a.) He understood the disadvantages of self-representation but felt that "I don't know the law that good but I do know enough." (Pet. App. 28a.) He insisted that he would "do a lot more" than would his assigned attorney in terms of defending his case. (Pet. App. 29a.)

At the end of this colloquy, the trial court denied Brooks's motion to represent himself at trial, based entirely on its conclusion that Brooks was not competent to represent himself. (Pet. App. 44a.) The trial court had previously adjudged Brooks competent to stand trial and never modified that finding. (Pet. App. 26a-27a.) The trial court determined

that Brooks had no right to represent himself because of the "different standard for competency to waive one's right to an attorney" and the failure of Brooks to articulate "satisfactory answers" in response to the court's questioning about his competency to represent himself.[1] (Pet. App. 27a, 43a.) Brooks failed to satisfy the "different standard" for competency to represent himself at trial although he satisfied the standard for competency to stand trial.

Following his conviction, Brooks argued that the trial court improperly had denied his motion to represent himself at trial. The Wisconsin Court of Appeals concluded that his challenge lacked merit: "Neither Brooks's postconviction motion nor his appellate brief explains how the trial court erred in concluding that Brooks, an inarticulate, unschooled, and disruptive individual, was not competent to represent himself in this complex trial." (Pet. App. 24a.) (citing *State v. Klessig*, 564 N.W.2d 716, 724 (Wis. 1997)). The Wisconsin Supreme Court summarily denied Brooks's petition for review. (Pet. App. 18a.)

The proceedings below followed. The district court denied Brooks's petition for writ of habeas corpus under 28 U.S.C. § 2254. It recognized that a criminal defendant's right to represent himself is established by federal law (Pet. App. 14a.), but accepted the Wisconsin trial court's conclusion that Brooks was incompetent to represent himself at trial. (Pet. App. 15a-16a.)

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[1] "THE COURT: . . . . And that goes to whether or not defendant has the basis based upon the record in this case, based upon his lack of educational experiences, his articulateness, whether or not he really can form the competency to knowingly waive that constitutional right. *For that reason* the Court's going to deny the defendant's motion." (Pet. App. 44a.) (emphasis added).

Brooks appealed. He argued that, in accordance with this Court's holdings in *Godinez v. Moran*, 509 U.S. 389 (1993), and *Faretta v. California*, 422 U.S. 806 (1975), the determination by the Wisconsin trial court that he was competent to stand trial necessarily established his competence to represent himself at trial. In its decision affirming the denial of relief, the Seventh Circuit—after acknowledging that it "may be wrong"—concluded that the states are free to establish different standards for competency to stand trial and for competency to represent oneself at trial.[2] (Pet. App. 6a.) The Seventh Circuit held that Wisconsin's application of a higher standard of competency for self-representation than for standing trial was consistent with this Court's rulings in *Godinez* and *Faretta*. Moreover, according to the Seventh Circuit, even if *Godinez* and *Faretta* did preclude states from establishing higher competency standards to represent oneself than to stand trial—a possibility the Court of Appeals explicitly recognized—the state court's conviction here would still stand because "*Godinez* did not *clearly* establish a rule" as is necessary to obtain relief by means of a federal habeas corpus petition. (*Id.*)

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve a persistent conflict among the lower federal and state courts, recognized by the Seventh Circuit below, concerning whether the Sixth Amendment precludes a state criminal court from establishing a standard of competency for self-representation

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[2] In analyzing Brooks's competency to represent himself, the Court of Appeals noted Brooks's disruptive behavior during trial and the timing of Brooks's request to represent himself but recognized that neither of these factors was the reason for the trial court's ruling denying self-representation. (Pet. App. 2a-3a.) Rather, the "reason" for the ruling was Brooks's inability to satisfy the elevated Wisconsin standard for self-representation at trial. (Pet. App. 44a.)

at trial that is higher than the standard of competency that a criminal defendant must possess to stand trial. Granting certiorari would also allow this Court to address whether *Godinez* and *Faretta* constitute "clearly established" federal law and thus allow for the defendant's collateral attack upon his criminal conviction under 28 U.S.C. § 2254 (2000), which sets forth the standards for federal habeas review under the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA").

There is an irreconcilable dispute among the federal courts of appeals and the state courts concerning the relationship between the standards for competency to stand trial and for self-representation at trial. With the exception of the Seventh Circuit below, every federal circuit court of appeals to consider the question has concluded that, under *Godinez* and *Faretta*, those two standards are necessarily identical. The Seventh Circuit nevertheless concluded that these standards may differ, and thus found no constitutional infirmity in Wisconsin's regime of requiring a criminal defendant to demonstrate a higher degree of competence to exercise his Sixth Amendment right to represent himself than the degree of competence that, under the Sixth Amendment, suffices to subject that same defendant to the criminal process in the first place. The majority of the state supreme courts that have addressed the issue also interpret *Godinez* to require a uniform standard of competency for all the various categories of Sixth Amendment questions.

Granting this petition would accordingly enable this Court to resolve this conflict, which goes to the heart of the American criminal process. This conflict arises frequently in our criminal courts. The decision below and the minority position in the states are especially troubling, because they endorse regimes in which a criminal defendant may be subjected to one of the most formidable powers of the state

without the defendant's having the fundamental capacity to control the course of his own defense against the exercise of that power.

That Brooks seeks this relief in a federal collateral review of a state criminal conviction also raises a fundamental question about federal habeas corpus review. The courts are divided as to what constitutes "clearly established" federal law under 28 U.S.C. § 2254(d)(1). In manifest tension with the approach evinced by the great majority of federal courts and state courts, and, more importantly, with this Court's prior rulings on the question, the Seventh Circuit held below that this Court's decisions in *Godinez* and *Faretta* are insufficient to "clearly establish" federal law on the Sixth Amendment question that this case squarely presents. This case accordingly provides an excellent opportunity to elaborate on the profoundly important question of what it means for law to be "clearly established." The resolution of this question would have a significant effect on many petitions seeking collateral review of state criminal convictions.

Each of the questions presented in this petition is sufficiently important and unsettled to merit review in its own right. Considering them together would allow this Court to resolve one or both of these critical questions, and further would allow the Court to clarify in more detail the circumstances under which it is appropriate to invoke the writ of habeas corpus under the AEDPA.

I. THIS COURT SHOULD DETERMINE WHETHER THE SIXTH AMENDMENT STANDARD ARTICULATED IN *GODINEZ* AND *FARETTA* PERMITS A STATE CRIMINAL COURT TO REQUIRE A DEFENDANT TO DEMONSTRATE A HIGHER DEGREE OF COMPETENCY TO REPRESENT HIMSELF THAN TO STAND TRIAL, A QUESTION ON WHICH THE OPINION BELOW CONFLICTS WITH THE VIEWS OF THE SIX OTHER FEDERAL COURTS OF APPEALS AND A MAJORITY OF STATE HIGH COURTS THAT HAVE ADDRESSED THE QUESTION.

The fundamental issue in this case is whether *Godinez* and *Faretta* prescribe that state-established standards for competency to stand trial and competency to represent oneself must be the same. All federal circuit courts of appeals (other than the Seventh Circuit) that have addressed the question and most state high courts have determined that, under this Court's rulings in *Godinez* and *Faretta*, a state is prohibited from establishing a standard of competency to represent oneself at trial that is more stringent than the standard of competency to stand trial in the first instance.

In addition to the Seventh Circuit, six other federal courts of appeals have addressed the question. They all view *Godinez* as holding that competency to stand trial by itself suffices to establish competency to waive counsel. Consequently, a waiver of the right to counsel by a criminal defendant who is competent to stand trial is effective *per se*, so long as the waiver of the right is knowing and voluntary. *See United States v. Ellerbe*, 372 F.3d 462, 466 (D.C. Cir. 2004) ("The Supreme Court has expressly held, however, that a defendant who is competent to stand trial is also competent to waive his right to assistance of counsel—all

that is necessary is that he do so intelligently and voluntarily."); *Shafer v. Bowersox*, 329 F.3d 637, 650 (8th Cir. 2003) ("Although there is no distinction between the competency required to stand trial and the competency to waive constitutional rights, the Court made clear in *Godinez* that a finding that a defendant is competent does not mean that a defendant has made a knowing and voluntary waiver."); *United States v. Peppers*, 302 F.3d 120, 131 n.9 (3d Cir. 2002) ("[T]he standard for competency to stand trial is the same as the standard to plead guilty or to waive counsel, except that a person seeking to waive a constitutional right must also demonstrate that the waiver is knowing and voluntary."); *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000) ("The Supreme Court has made clear that the standard of competence for waiving counsel is identical to the standard of competence for standing trial."); *United States v. Hernandez*, 203 F.3d 614, 620 n.8 (9th Cir. 2000) ("[T]he Supreme Court held that a defendant's competence to waive the right to counsel is measured by the same standard under which competence to stand trial is evaluated."); *United States v. Boigegrain*, 155 F.3d 1181, 1186 (10th Cir. 1998) ("In *Godinez*, the Court held that the degree of competence necessary to waive the right to counsel is identical to the degree of competence necessary to stand trial.").

In contrast, albeit with the caveat that it "may be wrong," the Seventh Circuit held below that a state is free to establish a standard of competency to represent oneself at trial that is more stringent than the standard of competency to stand trial. (Pet. App. 6a.) The Seventh Circuit acknowledged the *Godinez* rationale that there is no reason to believe "'that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights. . . . [A] criminal defendant's ability to represent himself has no bearing upon his competence to

choose self-representation.'" (Pet. App. 4a.) (quoting *Godinez*, 509 U.S. at 399-400). Faced with this clearly expressed holding, the Seventh Circuit attempted to legitimate regimes that employ inconsistent standards by invoking the difference between "mental functioning" and the "information" needed to make an effective waiver. (Pet. App. 4a.) The Seventh Circuit thus conflated the standard of competency necessary to stand trial and to represent oneself at trial with the separate question of whether a defendant has made an effective waiver of counsel in a given situation. But waiver was not at issue in the state proceedings, as the state courts and the Seventh Circuit below explicitly acknowledged. (Pet. App. 3a.) Brooks was denied the right to represent himself solely because the same court that found him competent to be put on trial also found him incompetent to represent himself at that trial.

This Court has been at pains to distinguish the question of competence from the question of effective waiver. *Godinez* explicitly adopted a "two-part inquiry:"

> *In addition* to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. In this sense there *is* a 'heightened' standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of *competence*.

509 U.S. at 400-01 (citations omitted) (first emphasis added).

Godinez thus recognized that, in terms of *competence*, the defendant's capacity to proceed *pro se* requires nothing more than confirming his capacity to stand trial. Nevertheless, the Seventh Circuit below pronounced that a waiver of counsel would be "senseless" if a defendant knew he was incompetent to defend himself. (Pet. App. 3a.) The Seventh Circuit's statement—that "[i]t is one thing for a defendant to

have sufficient mentation to be able to follow the trial proceedings with the aid of a lawyer, and another to be able to represent himself" (*id.*)—contradicts *Godinez*, which recognized: "Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not," 509 U.S. at 399.

The failure to apprehend or acquiesce in the basic distinction between the questions of competence *vel non* and the effectiveness of a defendant's waiver of the right to counsel caused the Seventh Circuit, contrary to *Godinez* and *Faretta* (and in direct conflict with the other six federal courts of appeals that have addressed the question) to uphold the Wisconsin state court's utilization of a higher standard for competency to waive counsel than for competency to stand trial.

The question presented in this petition further calls for this Court's resolution because there is also significant conflict and disagreement among the state courts as to their own powers to fashion different standards of competency in addressing questions of capacity to stand trial and capacity for self-representation. The Wisconsin Supreme Court has explicitly held that *Godinez* permits determinations of competency to represent oneself to take place under a higher standard than determinations of competency to stand trial. *Klessig*, 564 N.W.2d at 724. The *Klessig* court grounded this reasoning in the *Godinez* proviso allowing states to adopt competency standards more elaborate than this Court set forth in *Dusky v. United States,* 362 U.S. 402 (1960) (per curiam).[3] Two other state supreme courts have adopted this

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[3] In *Dusky*, the Court established that the standard for competence to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." 362 U.S at 402.

approach. The Supreme Court of Massachusetts suggested that a finding "that a defendant is competent to act as his own lawyer (with standby counsel) may require a greater showing than that the defendant is competent to stand trial." *Commonwealth v. Simpson*, 704 N.E.2d 1131, 1135 n.5 (Mass. 1999). The Illinois Supreme Court required something more than competency to stand trial from a defendant who had been found competent to stand trial and had waived his right to counsel in *People v. Lego*, 660 N.E.2d 971, 978-80 (Ill. 1995), when the court reversed a conviction and remanded for a new trial. The *Lego* court couched this holding in terms of the defendant's mental illness affecting adversely his capability to make a knowing and intelligent waiver of counsel. *Id.* at 979.

These three state courts depart from the views, shared by most other state courts, that a state may establish a higher standard of competency only if it applies that higher standard consistently with respect to all constitutional rights that depend on a determination of competency. The great majority of state supreme courts have reached the conclusion that the standards of competency to stand trial and to represent oneself at trial must be the same. *See, e.g., People v. Welch*, 976 P.2d 754, 777 (Cal. 1999) ("[T]he [C]ourt defined competence to plead guilty or to waive the assistance of counsel, equating it with competence to stand trial."); *State v. Wolff*, 678 A.2d 1369, 1386 (Conn. 1996) ("[A]ny defendant who is competent to stand trial as a matter of state law is competent to waive the right to counsel."); *Lamar v. State*, 598 S.E.2d 488, 491 (Ga. 2004) ("The standard of mental competency to stand trial is the same as the standard of mental competency to waive the right to counsel."); *State v. Cooley*, 608 N.W.2d 9, 17 (Iowa 2000) ("[A prior] decision created some question as to whether the standard for competence to stand trial was the same as that required to waive the right to the assistance of counsel. The Court

settled this controversy in *Godinez* where it was held the two standards were indeed the same."); *State v. Camacho*, 561 N.W.2d 160, 171 (Minn. 1997) ("In *Godinez*, the Court held that the legal standard for competence to waive counsel is the same as the legal standard for competence to stand trial); *Johnson v. State*, 17 P.3d 1008, 1015 n.19 (Nev. 2001) ("[T]he standards of competency to stand trial and waive counsel are identical."); *State v. Jordan*, 804 N.E.2d 1, 8 (Ohio), *cert. dismissed*, 73 U.S.L.W. 3273 (U.S. 2004), ("[T]he standard of competence to waive the right to counsel is the same as the standard for competency to stand trial."); *Commonwealth v. Jermyn*, 709 A.2d 849, 861 (Pa. 1998) ("The United States Supreme Court, in its 1993 decision in *Godinez*, held that the competency standard for pleading guilty or waiving the right to counsel is not higher than the competency standard for standing trial."); *Hauck v. State*, 36 P.3d 597, 602 (Wyo. 2001) ("The United States Supreme Court has held that the degree of competence necessary for a defendant to waive counsel is the same degree of competence required for him to stand trial.").

Indeed, this issue has generated controversy even among justices of a single state high court. Concurring in *Klessig*, Wisconsin Supreme Court Justice Abrahamson agreed with the majority of states that require the standards of competency to stand trial and to represent oneself be identical. While joining the mandate of the majority, Justice Abrahamson wrote separately to underscore the difficulties inherent in failing to follow the rule of law established in *Godinez* and *Faretta*. In her view, the majority failed to explain how adopting a more stringent standard of competency for self-representation could be consistent with *Faretta*. *Klessig*, 564 N.W.2d at 726-27 (Abrahamson, J., concurring); *see also Faretta*, 422 U.S. at 817 (acknowledging universal conviction that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to

defend himself if he truly wants to do so."). Thus, Justice Abrahamson concluded that states may adopt a standard more elaborate than *Dusky* "only if that standard is applied equally to competency to stand trial and competency for self-representation." *Klessig*, 564 N.W.2d at 726 (Abrahamson, J., concurring).

The instant case now presents the opportunity to bring in line with clearly established federal law those state and federal courts that are in conflict with *Godinez* and *Faretta*. This Court should also grant certiorari to resolve the confusion that exists in those states that have not adopted a standard for competency to represent oneself higher than the standard for competency to stand trial, but have indicated that they could do so in the future. *See, e.g., Gregg v. State*, 833 A.2d 1040, 1060 (Md. 2003) (claiming that Supreme Court has found states are free to adopt higher standard for competency to waive counsel); *State v. Arguelles*, 63 P.3d 731, 751 n.17 (Utah), *cert. dismissed*, 124 S. Ct. 926 (2003), (noting that states are "free to adopt competency standards that are more elaborate").

The issue presented here is important not only because it is the subject of an entrenched conflict among lower courts, but also because the right to self-representation is fundamental to a fair trial; and, the fairness of the trial process underlies the proper functioning of the criminal justice system. *See Rose v. Clark*, 478 U.S. 570, 577-78 (1986). This Court has held that a criminal defendant has an independent constitutional right to self-representation. *Faretta*, 422 U.S. at 807. The Sixth Amendment implies the right to represent oneself, which exists "to affirm the accused's individual dignity and autonomy." *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984). Both the right to counsel and the right to represent oneself are essential to a fair trial. *See Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("An

accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). State rules of criminal procedure may not differ from federal standards if they "'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina v. California*, 505 U.S. 437, 446 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)). The right to elect self-representation at trial is such a right. *See Faretta*, 422 U.S. at 812 ("[T]he right of self-representation has been protected by statute since the beginnings of our Nation."). The denial of the right to self-representation constitutes a structural defect and is not harmless error. *McKaskle*, 465 U.S. at 177 n.8.[4]

For these reasons, Brooks respectfully asks this Court to determine whether the Seventh Circuit erred in allowing the State of Wisconsin to require him to satisfy a higher standard of competency to represent himself than to stand trial.

II. THIS COURT SHOULD DETERMINE WHETHER THE STANDARDS ARTICULATED IN *GODINEZ* AND *FARETTA* CONSTITUTE "CLEARLY ESTABLISHED FEDERAL LAW" ENTITLING A CONVICTED CRIMINAL DEFENDANT TO OBTAIN FEDERAL COLLATERAL RELIEF UNDER 28 U.S.C. § 2254.

The Seventh Circuit also held below that *Godinez* did not "*clearly* establish" a rule of law, and therefore, even if it

[4] The improvident denial of the right to represent oneself at trial may affect adversely other aspects of the criminal process as well. For example, the Ninth Circuit has pointed out that an erroneous denial of the right to self-representation entails that a subsequent guilty plea must be considered involuntary as a matter of law because it forces a defendant to choose between pleading guilty and submitting to a trial that would be structurally unconstitutional. *United States v. Kaczynski*, 239 F.3d 1108, 1116 (9th Cir. 2001).

were incorrect in its interpretation of *Godinez*, Brooks would still not be entitled to habeas corpus relief.[5] In so holding, the Seventh Circuit misapplied the provision in 28 U.S.C. § 2254(d)(1) that an application for a writ of habeas corpus may not be granted unless the adjudication of the claim at the state court level "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

This Court has already begun the critical task of expounding the meaning of the operative term "clearly established Federal law" in the AEDPA. In *Williams v. Taylor*, 529 U.S. 362, 412 (2000), the Court held "[t]hat statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." This case provides an unusually suitable occasion for clarifying when federal law is "clearly established."

It is the holding of *Godinez*, not its dicta, that establishes the same standard for competency to stand trial as for competency to represent oneself. 509 U.S. at 399-400. Many federal circuit courts of appeals have characterized *Godinez* as *holding* that those standards are identical.

[5] The Seventh Circuit wrote below:

> *We may be wrong*, but if so Brooks still must lose. Remember that a state court's decision can be struck down in a federal habeas corpus proceeding only if it is contrary to "clearly established" federal law as declared by the Supreme Court. *Godinez* did not *clearly* establish a rule, which is the rule for which Brooks contends, that a defendant found competent to stand trial is automatically entitled to represent himself no matter how deficient his understanding of the consequences of going to trial without a lawyer.

(Pet. App. 6a-7a.) (emphasis added).

Ellerbe, 372 F.3d at 466; *Hernandez*, 203 F.3d at 620 n.8; *Boigegrain*, 155 F.3d at 1186. Yet, disagreements over what constitutes a holding and what constitutes dicta pervade opinions at all levels, and include lower court judges attempting to abide the holding in a controlling case as well as judges in the same circuit determining "holding versus dicta" in their own precedent. *In Re Fowlkes*, 326 F.3d 542, 546 (4th Cir. 2003) (disagreeing with concurrence characterization of prior Fourth Circuit opinion as dicta and acknowledging underlying problem of ignoring AEDPA's mandate not to proceed to substantive merits of habeas petition unless certificate of appealability issues); *Chadwick v. Janecka*, 312 F.3d 597, 613 (3d Cir. 2002) (indicating district court incorrectly relied on dicta from Third Circuit opinion where AEDPA "is clear that the appropriate law to apply is Supreme Court precedent," though lower federal court opinions may be helpful amplifications of such precedent); *Aron v. United States*, 291 F.3d 708, 713 n.4 (11th Cir. 2002) (disagreeing with view of concurring opinion that holding that petitioner's failure to exercise due diligence prior to AEDPA enactment cannot support finding that petition does not satisfy timeliness requirement of 28 U.S.C. § 2255(4) was actually dicta because the "fact that either error would be sufficient to warrant reversal does not mean that future panels are free to treat one of these two findings as dicta.").

Judge Kozinski of the Ninth Circuit has emphasized the risk inherent in subsequent panels unilaterally characterizing as "dicta" what prior panels considered to be "holdings:"

> Whether a court ought to speak to an issue that is not strictly necessary to the outcome of the case is a legitimate topic of debate during the process of collegial deliberation. . . . But it is quite a different matter to suggest . . . that the work product of a panel

> of this court can simply be disregarded because a later panel finds a way to call it "dicta" or "advisory" or some similar invective.

Spears v. Stewart, 283 F.3d 992, 1005-06 (9th Cir. 2002) (statement of Kozinski, J., concerning denial of petitions for rehearing *en banc*). The dissent in *Spears* considered portions of the prior opinion to be dicta because "whether or not the Arizona scheme satisfied the requirements of Chapter 154 [of the AEDPA] was entirely irrelevant to the outcome of [the] case," and because the Arizona procedure that the panel decision validated had been repealed by the time of consideration. *Id.* at 999-1000 (Reinhardt, J., dissenting from denial of petitions for rehearing *en banc*).

These concerns apply to a categorically higher degree to the opinions of this Court. By granting certiorari here, the Court could clarify these issues, which continue to challenge many lower court judges.[6]

Deciding what constitutes "clearly established" federal law is a threshold question. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). There is a disconcerting diversity of approaches to this threshold question. For example, the lower courts disagree as to the number of Supreme Court

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[6] The decision below has already threatened to engender significant confusion among the courts bound to apply it. For example, the court in *Gomez v. Berge*, No. 04-C-17-C, 2004 U.S. Dist. LEXIS 16360, at *43-*44 (W.D. Wis. Aug. 18, 2004), *adopted by* unpublished order (W.D. Wis. Oct. 22, 2004), noted that the Seventh Circuit in *Brooks* failed to "cite to any facts found by the state trial court that supported its conclusion that Brooks did not understand the dangers of self-representation," but rather mentioned Brooks's obstreperous behavior as an indication of his lack of competence to represent himself. Significantly, the *Gomez* court found the opinion in *Brooks* "difficult to reconcile with *Faretta* and *Godinez*," but could not analyze the case as it would have done earlier because the decision below already had become "the law of this circuit." 2004 U.S. Dist. LEXIS 16360, at *43-*46.

cases necessary to "clearly establish" federal law. Several courts have looked to only one case in deciding that the federal law was clearly established. *See, e.g.*, *Kandies v. Polk*, 385 F.3d 457, 468-69 (4th Cir. 2004) (holding that *Strickland* clearly established federal law rule as to what constitutes ineffective assistance of counsel); *Sellan v. Kuhlman*, 261 F.3d 303, 309 (2d Cir. 2001) (holding that *Strickland* clearly established the prejudice and performance test for ineffective assistance of counsel claim); *Moxley v. Bennett*, 291 F. Supp. 2d 212, 226-27 (W.D.N.Y. 2003) (holding that *Batson v. Kentucky*, 476 U.S. 79 (1986), clearly established federal law as to racial discrimination in jury selection procedures); *McGhee v. Jackson*, No. 01-CV-73860-DT, 2002 U.S. Dist. LEXIS 21930, at *4-*12 (E.D. Mich. Oct. 10, 2002) (holding that *Batson* clearly established federal law as to racial discrimination in jury selection procedures); *Dible v. Ault*, No. C99-4010-MWB, 2000 U.S. Dist. LEXIS 21404, at *58-*62 (N.D. Iowa Oct. 20, 2000), *adopted by* 2001 U.S. Dist. LEXIS 10541 (N.D. Iowa July 12, 2001), (holding that *Strickland* clearly established federal law as to ineffective assistance of counsel claims).

In contrast, the Seventh Circuit held that, here, two Supreme Court decisions, namely *Godinez* and *Faretta*, did not "clearly establish" federal law. The Seventh Circuit did not explain the rationale behind this holding, but in so ruling, the Seventh Circuit denied relief to the petitioner. (Pet. App. 6a.) Guidance, therefore, is needed from this Court so that all lower courts abide this Court's decisions in *Godinez* and *Faretta*, which "clearly establish" federal law under applicable standards.

Williams explained that "[w]ith one caveat, whatever would qualify as an old rule under our *Teague* [*v. Lane*, 489 U.S. 288, 301 (1989)] jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court

of the United States' under § 2254(d)(1)." 529 U.S. at 412. The caveat is that only Supreme Court jurisprudence may clearly establish federal law. *Teague* held that habeas relief may not issue where the defendant's constitutional claim is based on a "new rule." 489 U.S. at 310. A "new rule" is one which is not mandated by precedent at the time that the defendant's conviction became final on direct review. *Id.* at 301.

There is no "new rule" in this case. Here, both the Wisconsin Court of Appeals decision (1999) and the Wisconsin Supreme Court's denial of review (1999) were issued well after *Godinez* (1993). Because the difference between a "new rule" and an "old rule" is the timing in relation to the finality of the defendant's conviction, the standard set forth in *Godinez* and *Faretta* was a clearly established "old rule" at the time of Brooks's conviction. "[A]n old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law.'" *Williams*, 529 U.S. at 412. That standard therefore entitled Brooks to a writ of habeas corpus in the proceedings below.

This Court should review the decision below to correct the Seventh Circuit and prevent future similar failures by district courts and circuit courts of appeals to grant habeas corpus relief in cases where state courts have failed to follow rules "clearly established" by this Court's constitutional jurisprudence.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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November 10, 2004

APPENDICES

Appendix A

United States Court of Appeals,
Seventh Circuit.

EDDIE L. BROOKS, Petitioner-Appellant,

v.

GARY R. McCAUGHTRY, Respondent-Appellee.

No. 02-4324

Argued April 5, 2004
Decided August 12, 2004

OPINION

Before BAUER, POSNER, and DIANE P. WOOD, *Circuit Judges*.

POSNER, *Circuit Judge*.

Eddie Brooks was convicted in a Wisconsin state court of first-degree murder of a policeman, and related crimes, and was sentenced to life in prison plus 109 years. After exhausting his state remedies in *State v. Brooks,* 607 N.W.2d 290 (Wis. 1999), he sought federal habeas corpus, lost in the district court, and appeals, contending that the Wisconsin trial court deprived him of his federal constitutional right to represent himself. *Faretta v. California,* 422 U.S. 806 (1975). (His other contentions do not merit discussion.) To prevail, he must show that the state decision of which he complains "was contrary to, or involved an unreasonable

application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Before his trial began, Brooks was permitted to fire two lawyers who had been appointed in succession to represent him. A third was appointed. The judge warned Brooks that if he fired number three, he would have to represent himself. When the case was called for trial, Brooks moved to dismiss the lawyer (whose motion to withdraw at Brooks's request had been denied) and when the judge denied the motion Brooks punched the lawyer in the face. Two days later, after jury selection, Brooks moved that he be allowed to represent himself. After quizzing him about his educational background and his knowledge of the law, the judge denied the motion.

The judge conceivably could have ruled that Brooks's motion to represent himself was untimely. *Hamiel v. State,* 285 N.W.2d 639, 648-49 (Wis. 1979); *United States v. Kosmel,* 272 F.3d 501, 505-06 (7th Cir. 2001); *Cain v. Peters,* 972 F.2d 748 (7th Cir. 1992). "A person accused of a crime has an absolute right, under the Sixth Amendment, to represent himself only if he asserts that right before trial." *United States v. Washington,* 353 F.3d 42, 46 (D.C. Cir. 2004). Here, the trial had begun, Brooks had already run through three lawyers—suggesting that he might have intended from the get-go to represent himself—and the evidence against him was overwhelming, suggesting that he might be seeking by his latest change of heart merely to disrupt the trial. Yet having told Brooks that if he fired lawyer number three he would have to represent himself, the judge might well have been understood to be giving Brooks until then to decide to represent himself, consistent with cases such as *United States v. Oreye,* 263 F.3d 669, 670-71 (7th Cir. 2001), and *United States v. Irorere,* 228 F.3d 816,

826-28 (7th Cir. 2000). Those cases hold that a defendant who is warned that if he fires his lawyer he'll have to represent himself will, if he does fire the lawyer, be deemed by doing so to have chosen to represent himself. However all this may be, the judge based his denial of Brooks's motion not on timeliness but on competency, and Brooks argues that the ruling deprived him of the right recognized in the *Faretta* case.

He contends that anyone competent to stand trial, as he was, is ipso facto competent to waive counsel. Whether this contention is sound depends on the exact meaning of "competent." It is one thing for a defendant to have sufficient mentation to be able to follow the trial proceedings with the aid of a lawyer, and another to be able to represent himself; and while Brooks clearly had the former, he seems equally clearly to have lacked the latter, if we may judge from his wild behavior and incomprehensible outbursts during the trial. And if he was incompetent to conduct his own defense, this is evidence that his decision to waive counsel was not "knowing and intelligent," as all waivers must be in order to be legally effective. E.g., *Iowa v. Tovar,* 124 S. Ct. 1379, 1387 (2004), *Faretta v. California, supra,* 422 U.S. at 835; *Johnson v. Zerbst,* 304 U.S. 458, 464-65 (1938); *United States v. Irorere, supra,* 228 F.3d at 828. A waiver of counsel would make no sense from the defendant's standpoint if he *knew* he was incompetent to defend himself (unless his intent was to disrupt the trial—in which event it would not be an exercise of the right recognized by *Faretta*); and so senseless a waiver could only with difficulty be regarded as knowing and intelligent. That appears to be this case.

But Brooks argues that in *Godinez v. Moran,* 509 U.S. 389 (1993), the Supreme Court held that the standard for competence to stand trial and the standard for competence to

waive counsel are identical, and if his interpretation (whic
some courts have accepted, e.g., *People v. Welch,* 976 P.2
754, 774 (Cal. 1999); *State v. Day,* 661 A.2d 539, 548 (Conn
1995); *State v. Camacho,* 561 N.W.2d 160, 172 (Minn
1997)) is correct, it might seem to follow that we must orde
a new trial for Brooks. But we doubt both the premise an
the conclusion. The Supreme Court in *Godinez* did reject th
idea "that the decision to waive counsel requires a
appreciably higher level of mental functioning than th
decision to waive other constitutional rights . . . . [A
criminal defendant's ability to represent himself has n
bearing upon his competence to *choose* self-representation."
509 U.S. at 399-400 (emphasis in original; footnote omitted)
But there is a difference between mental functioning, whic
is the ability to process information, and the informatio
itself; more information may be required for an effectiv
waiver of the right to counsel than for being able to follow
the goings-on at one's trial. And so the Court went on to say
that the judge must satisfy himself that the defendant no
only has the requisite mental competence to choose whethe
to represent himself but also knows enough about th
consequences of his choice to make it "intelligent an
voluntary." *Id.* at 401-02. As we have explained, an effectiv
"waiver of the right to the assistance of counsel *at trial,* th
stage of a criminal prosecution most difficult for a layperson
to navigate, may require an oral inquiry to ensure that th
defendant chooses with knowledge of his entitlements an
his eyes open to the dangers of self-representation." *Speights
v. Frank,* 361 F.3d 962, 964 (7th Cir. 2004) (emphasis in
original).

The Court further said in *Godinez* that "states are free to
adopt competency standards that are more elaborate than" the
standard laid down for competence to stand trial in *Dusky v.
United States,* 362 U.S. 402 (1960) (per curiam), but "the
Due Process Clause does not impose these additional

requirements." 509 U.S. at 402. The *Dusky* (due process) standard of competence to stand trial requires that the defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." 362 U.S. at 402. Note the assumption that the defendant *has* a lawyer—that he is not trying to represent himself. Self-representation was not the issue in *Dusky*.

Even more important is the distinction between what due process requires and what it permits. In the decision the Supreme Court reversed in *Godinez*, the Ninth Circuit had imposed a *federal* minimum standard of competence for self-representation in state prosecutions that was higher than the *Dusky* standard, and it was this that the Court was disapproving. The reason for disapproving it, we conjecture, was that it might enforce against the states a concept of ineffective self-representation. Suppose the Ninth Circuit's approach (which required that the defendant be capable of a "reasoned choice" to represent himself) required a defendant to be sufficiently skilled and knowledgeable to be able to do a really creditable job of self-representation. Then if a state judge allowed a defendant to represent himself and the defendant screwed up, the state would have to give him a second bite at the apple—a second trial, this time with assistance of counsel whether he wanted it or not. *Cain v. Peters, supra,* 972 F.2d at 750; Alan R. Felthous, "The Right to Represent Oneself Incompetently: Competency to Waive Counsel and Conduct One's Own Defense Before and After *Godinez*," 18 *Mental & Physical Disability L. Rep.* 105, 109 (1994). No federal policy, whether found in the due process clause of the Fourteenth Amendment or anywhere else, is offended by a state's adopting a rule that may allow some of its criminal defendants to whipsaw it.

And even if the *standards* for competence to stand trial and for competence to waive the right of counsel are the same, the existence of an effective waiver need not be automatically deduced from a finding that the defendant is competent to stand trial. This would be obvious if having determined that the defendant was competent to stand trial the judge had asked the defendant whether he wanted a lawyer but had not explained the consequences of going to trial without one. A judge who, having explained the consequences, finds that the defendant doesn't understand them is entitled to conclude that although competent to stand trial, the defendant has not made an effective waiver of his right to counsel and therefore may not represent himself. This result is consistent with *Godinez*.

Wisconsin, as this case illustrates, has set a higher standard for waivers of the *Faretta* right than for competence to stand trial. See also *Commonwealth v. Simpson,* 704 N.E.2d 1131, 1135 n. 5 (Mass. 1999). The Supreme Court of Wisconsin held in *State v. Klessig,* 564 N.W.2d 716, 722-24 (Wis. 1997), that the state's approach, adopted in *Pickens v. State,* 292 N.W.2d 601, 609-11 (Wis. 1980), had survived *Godinez*, albeit with a modification irrelevant to this case. Because being competent to stand trial and having waived the right to counsel do not require the same information, and because the former competence does not imply an effective waiver in all cases, we do not think that Wisconsin's approach violates the rule of *Godinez*.

We may be wrong, but if so Brooks still must lose. Remember that a state court's decision can be struck down in a federal habeas corpus proceeding only if it is contrary to "clearly established" federal law as declared by the Supreme Court. *Godinez* did not *clearly* establish a rule, which is the rule for which Brooks contends, that a defendant found competent to stand trial is automatically entitled to represent

himself no matter how deficient his understanding of the consequences of going to trial without a lawyer.

AFFIRMED.

Appendix B

United States District Court,
Eastern District of Wisconsin.

EDDIE LEE BROOKS, Petitioner,

v.

GARY R. McCAUGHTRY, Respondent.

Case No. 00-C-1481

October 28, 2002

GRIESBACH, District Judge.

DECISION AND ORDER

Eddie Lee Brooks, an inmate at Waupun Correctional Institute, has petitioned this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Brooks is presently serving a sentence of life plus 109 years for the 1990 first degree intentional homicide of Sergeant Michael Tourmo of the Milwaukee Police Department, two counts of attempted first degree intentional homicide, and one count each of first degree recklessly endangering safety, burglary, and felon in possession of a firearm, all with various penalty enhancers. In his pro se petition, Brooks claims he is entitled to habeas relief because he was denied his constitutional rights to effective assistance of counsel and to self-representation. He also claims that he was denied his right to present a defense, that the trial court erroneously ruled that he gave a confession and that the prosecutor engaged in misconduct. For the reasons that follow, I find no merit in any of Brooks' claims, deny his petition and order the case dismissed.

I. BACKGROUND

On the morning of November 18, 1990, officers of the Milwaukee Police Department were dispatched to a burglary

in process at the North Avenue Smoke Shop on the corner of 26th Street and North Avenue. (Answer, Ex. H, Part 117 at 92-94.) As they arrived, police saw two individuals fleeing the scene and gave chase. (*Id.* at 96.) Sergeant Tourmo was seen pursuing one of the individuals, who was later identified as Brooks, down an alley in his squad car. (*Id.* at 103-05.) As other officers arrived, they positioned their squads at various locations around the block, exited their squads and began looking for the fleeing subjects on foot. (*Id.* at 115-25, 137.) Both subjects were ultimately apprehended, but not before Brooks had gotten off several rounds at several of the pursuing officers. He tossed his gun after emptying it and surrendered as police were closing in. The other subject, Lavelle Chambers, was found hiding under a porch nearby. (*Id.* at 34-35.) When the officers were unable to raise Sergeant Tourmo on the radio, they retraced their steps and found him lying in a pool of blood with a bullet hole in his head. (*Id.* at 143-45.) Later that day, Brooks confessed to shooting Sergeant Tourmo as he walked by a porch on which he was hiding, and ballistic tests subsequently performed at the Wisconsin Crime Laboratory confirmed that the bullet retrieved from Tourmo's body had been fired from the gun Brooks had tossed just before he was apprehended. (*Id.*, Part 125 at 24-25, 80-81.)

A Milwaukee County jury found Brooks guilty of the homicide and other offenses noted above following a week-long trial, and he was sentenced on December 5, 1991. After two earlier appeals were dismissed on procedural grounds, the Wisconsin Court of Appeals by order dated June 11, 1997, allowed Brooks to file an untimely motion for postconviction relief pursuant to Wis. Stat. § 809.30. That motion, in which Brooks alleged that he was denied effective assistance of counsel; that the trial court erred in refusing to allow him to be represented by "jailhouse lawyers" or to proceed pro se during trial; and that his convictions resulted

from conspiracy, perjury and prosecutorial misconduct, was denied without hearing by the trial court. The trial court's decision was summarily affirmed by the Wisconsin Court of Appeals in an opinion and order dated October 6, 1999, and the Wisconsin Supreme Court denied Brooks' petition for discretionary review on November 7, 1999. On November 20, 2000, Brooks filed the petition for a writ of habeas corpus that is presently before me.

II. DISCUSSION

In order to prevail in a federal action for a writ of habeas corpus, the petitioner must prove that the state court's decision "was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States" or was based on "an unreasonable determination of the facts in the light of the evidence presented." 28 U.S.C. § 2254(d). A state court's decision is contrary to clearly established federal law, as determined by the Supreme Court of the United States, "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 413 (2000). A state court's decision involves an unreasonable application of established federal law "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* Moreover, it is not enough for a federal court reviewing a state court conviction under § 2254 to conclude that the state court's application of established federal law is simply incorrect or erroneous. For such application to warrant relief under § 2254(d)(1), it must be objectively unreasonable. *Id.* at 409-12.

A. Ineffective Assistance of Counsel

In his petition for habeas corpus, Brooks first claims that he was denied his Sixth Amendment right to the effective assistance of counsel. He alleges that his trial counsel, Attorney Michael Barth, (1) failed to challenge the admission of his confession; (2) failed to impeach the credibility of the law enforcement officers that testified to his apprehension and subsequent confession; (3) refused to investigate the case and call witnesses who could have provided information suggesting that someone else had done some of the shooting; and (4) failed to present a defense.

The Sixth Amendment right to the effective assistance of counsel is clearly established federal law as determined by the Supreme Court of the United States. In *Strickland v. Washington,* 446 U.S. 668, 686 (1984), the Court noted that its prior decisions had recognized that the right to counsel includes the right to the effective assistance of counsel. The *Strickland* Court then established a two-part test to determine whether the right to effective assistance of counsel was violated:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

In affirming the trial court's denial of Brooks' motion for postconviction relief, the Wisconsin Court of Appeals expressly cited *Strickland* and applied its test in evaluating his claim of ineffective assistance of counsel. Brooks has not cited any case with materially indistinguishable facts that the United States Supreme Court has decided differently. Thus, it cannot be said that the state court decision is contrary to established federal law on this issue. The questions presented, then, are whether the state court's decision resulted from an unreasonable application of *Strickland*, or whether it was based upon an unreasonable determination of the facts in light of the evidence presented.

Neither the application of *Strickland*, nor the determination of facts, was unreasonable. The court of appeals correctly noted that Brooks' allegation that his attorney failed to challenge the admissibility of his confession is belied by the record. The first of the three separate attorneys who represented him at the pretrial and trial stages of the proceedings moved to exclude the confession on the grounds that it was the fruit of an illegal arrest, that it was coerced and that it was obtained in violation of the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). The trial court conducted an extensive evidentiary hearing on the motion and ordered it denied.

The allegation that his trial attorney, Attorney Barth, failed to impeach the credibility of police witnesses is predicated on counsel's failure to present what Brooks contends are inconsistencies in the testimony and reports of various officers and, as to at least on officer, evidence that he previously was untruthful in an unrelated matters. The inconsistencies Brooks claims Attorney Barth failed to establish relate to such issues as whether he had remained in the squad car when he was transported back to the scene or excited the car with the detectives; whether they remained at

the scene until 7 p.m. or were back at the station by 6:30 p.m.; the precise time his car was towed from the scene; and the exact time an officer made certain entries in his memo book. Viewed in the context of the entire trial, the court of appeals reasonably characterized the alleged inconsistencies as "the most trivial disagreements over the course of events during the crime and its investigation." (Answer, Exhibit B, at 15.)

The evidence that one of the officers had been untruthful in an unrelated matter involved one of the two detectives who had interviewed Brooks after his arrest. The detective Brooks wanted to impeach, however, was never called as a witness by the state, and the court of appeals properly concluded that the evidence of untruthfulness in an unrelated matter would not have been admissible. Thus, counsel was not ineffective for failing to offer it.

Brooks' allegation that his Attorney Barth failed to investigate the case is also belied by the record. The Court of Appeals noted, and the record confirms, that Brooks' first attorney retained an investigator who independently interviewed witnesses, viewed the crime scene and took photographs. This evidence was turned over to Attorney Barth attorney well in advance of trial along with the state's response to the defense's discovery requests. In addition, Attorney Barth hired an investigator of his own. More importantly, Brooks is silent as to what exculpatory evidence could have been uncovered. In the absence of any showing that exculpatory evidence was available, an allegation that counsel's investigation was inadequate is entitled to no weight.

Brooks' conclusory allegation that his trial attorney did not present a defense likewise lacks support in the record. A review of the transcript reveals that Attorney Barth challenged the witnesses called by the state and made as

strong an argument to the jury as the evidence permitted. The strength of the defense he could present was limited, as it is in all cases, by the available evidence. Again, other than a few minor inconsistencies of the kind to be expected in a case of this nature, Brooks has pointed to no actual evidence that his attorney failed place before the jury.

In sum, Brooks has failed to allege any facts which, when viewed in the context of the record in this case, would support his claim that the representation provided by his attorney was constitutionally deficient. I therefore conclude that the Wisconsin Court of Appeals did not unreasonably apply the clearly established law of *Strickland* in rejecting his claim that his conviction was the result of ineffective assistance of counsel. I also conclude that its determination of the facts relating to this claim was not unreasonable in light of the evidence presented.

B. Rights to Self-Representation

Brooks next claims that the trial court violated his constitutional right to represent himself when, shortly after trial commenced, he requested that Attorney Barth be removed so he could conduct his own defense. The right to represent oneself, like the right to effective assistance of counsel, is also well established in federal law. The Supreme Court gave explicit recognition to such a right in *Faretta v. California*, 422 U.S. 806 (1975). But this right, like all rights, is not unlimited. A defendant who seeks to represent himself must be competent to do so. *Godinez v. Moran,* 509 U.S. 389 (1993). And *Faretta* itself recognized that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." 422 U.S. at 834 n. 46.

The record in this case reflects that Attorney Barth was in fact the third attorney assigned to the case. The first two had been fired by Brooks or allowed to withdraw at his request. As the trial was about to begin, Brooks attempted to fire Attorney Barth. Convinced that Brooks would find no attorney any more to his liking and reluctant to further delay the trial, the court denied Brooks' request. Brooks responded first by punching Attorney Barth in the face, and later by disrupting the jury selection process by claiming Attorney Barth was not his attorney and stating he would not participate in "this fraud." (Answer, Ex. H, Part 112 at 27, 56-57.) As a result of this conduct, the trial judge ordered Brooks shackled, and a new panel was brought in to begin the jury selection process again.

The following day, after the jury was impaneled and a view of the scene completed, Brooks for the first time advised the trial court of his desire to represent himself. (*Id.*, Part 116 at 3.) Based upon its concerns that his request was simply a ploy to further obstruct the trial and after considering the complexity of the case, the seriousness of the charges, and the defendant's lack of education and inability to clearly express himself, the trial court denied the motion. (*Id.* at 24-26.) Brooks claims that in doing so, the trial court violated his Sixth Amendment right to self-representation.

In its order affirming the trial court's denial of his motion for postconviction relief, the Wisconsin Court of Appeals rejected this claim, stating, "[n]either Brooks' postconviction motion nor his appellate brief explains how the trial court erred in concluding that Brooks, an inarticulate, unschooled, and disruptive individual, was not competent to represent himself in this complex trial." (Answer, Ex. B at 7.) From my review of the record, I am satisfied that the Wisconsin court's conclusion constitutes a reasonable application of the United States Supreme Court's decision in *Faretta*.

Brooks had already shown himself to be unable or unwilling to behave in a civil manner by punching his attorney in the face and disrupting the jury selection process to the point where the trial judge had ordered him shackled, excused one jury panel and started the selection process over. Even after these occurrences, at various times throughout the trial, Brooks disrupted the proceedings with his outbursts, sometimes laced with obscenities, claiming Attorney Barth was not his attorney and demanding to be removed from the courtroom. For at least part of the trial, Brooks was in fact removed from the courtroom. The culmination of this behavior occurred when he dropped his pants and "mooned" the trial judge from a holding cell at his sentencing. As a whole, the record provides strong support for respondents's contention that "Brooks was arguably one of the most disruptive criminal defendants ever to set foot in a Wisconsin courtroom. (Br. in Opp'n at 4-5.)

Faced with such behavior, the trial judge did not err in denying Brooks' request that he be allowed to represent himself. His behavior, both before and after the request was made, demonstrate an inability or unwillingness to act in a civil manner. *Faretta* expressly recognizes a trial judge's right to terminate self-representation under such circumstances. The state court's decision is a reasonable application of this rule. Indeed, any other response would have been unreasonable under the circumstances.

C. Other Claims

Lastly, Brooks claims he was denied his right to present a defense, the trial court erroneously ruled that he gave a confession and the prosecutor engaged in misconduct. To a large extent, these claims amount to no more than a rephrasing of his previous complaints concerning the quality

of his attorney's representation. His allegation that he was denied the right to present a defense, for example, is simply a rehash of his claim the his attorney failed to provide effective representation. His claim that the trial court erroneously concluded he had given a confession likewise is a restatement of his claim that the testimony of the two detectives who interviewed him was not adequately challenged. And his claim of prosecutorial misconduct amounts to an accusation that the prosecution knew the detectives were not testifying truthfully.

I am satisfied that none of these claims has merit. The trial transcript demonstrates that every precaution was made in order to assure that, despite Brooks' outrageous behavior, his constitutional rights were meticulously protected. The trial court commended Brooks' attorney for his conscientious professionalism under extremely trying circumstances. The reports filed by police officers closely matched radio recordings of their transmissions during the series of events. The court of appeals rightfully refused to give further consideration to conclusory claims of collusion and conspiracy since they were not supported by citations to the record or to legal authority. I am satisfied that it neither ignored nor unreasonably applied federal law in reaching its decision. Accordingly, I find no basis for granting Brooks the relief he seeks.

For the foregoing reasons, IT IS ORDERED that the petitioner's application for a writ of habeas corpus is denied, and this case is dismissed. The clerk of the court shall enter judgment accordingly.

Dated this 28th day of October, 2002.

Appendix C

Supreme Court of Wisconsin.

STATE

v.

BROOKS

No. 98-0440-CR

December 22, 1999

Disposition: Petition for Review Denied.

Disposition: 12/20/1999.

(SYKES, J., did not participate)

Appendix D

State of Wisconsin Court of Appeals, District I

STATE OF WISCONSIN

v.

EDDIE LEE BROOKS

(L.C. # F-904061)

97-2900

October 6, 1999

OPINION AND ORDER.

Before Fine, Schudson and Curley, JJ.

Eddie Lee Brooks was convicted of one count of first-degree intentional homicide while armed with a dangerous weapon, two counts of attempted first-degree intentional homicide while armed with a dangerous weapon, one count of recklessly endangering safety while armed with a dangerous weapon, one count of burglary, party to the crime, and one count of being a felon in possession of a firearm. Brooks appeals from a circuit court order denying his postconviction motion for a new trial. Based upon our review of the briefs and record, we conclude that this appeal is appropriate for summary disposition. *See* Rule 809.21(1), STATS. We affirm the circuit court's order.

The criminal complaint initiating this case indicates that on November 18, 1990, Brooks and a companion burglarized the North Avenue Smoke Shop in the City of Milwaukee. Numerous weapons were taken during the burglary. Upon

receiving a call that a burglary was in progress, a number of Milwaukee police officers, including Sergeant Michael Tourmo, responded to the call and went to the scene. Police pursued Brooks and his companion as they fled from the scene. Brooks fired a weapon at police as he ran. Eventually, Brooks ran to a residence near the North Avenue Smoke Shop where he hid on a porch. Shortly thereafter, Sergeant Tourmo ran by the porch where Brooks was hiding. Brooks saw Sergeant Tourmo and shot him in the head. Brooks left the porch and resumed his flight. The police apprehended Brooks shortly thereafter and took him into custody. Brooks confessed to shooting Sergeant Tourmo. Testimony of the medical examiner confirmed that Sergeant Tourmo was shot in the top of the head and that the entry wound was consistent with his having been shot while he was on ground level and the shooter was elevated.

Following Brooks's jury trial, the circuit court entered the judgment of conviction on December 5, 1991.[1] On June 11, 1997, this court issued an order construing a petition for a writ of habeas corpus that Brooks filed pursuant to ***State v. Knight***, 168 Wis.2d 509, 484 N.W.2d 540 (1992), as a motion for an extension of time for filing his notice of appeal or postconviction motion. Our order granted the motion and reinstated Brooks's postconviction rights under RULE 809.30, STATS.

Brooks then filed a postconviction motion alleging that he was denied the effective assistance of trial counsel; that the trial court erred in refusing to permit Brooks to be

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[1] The information charged Brooks with one count of first-degree intentional homicide while armed, three counts of attempted first-degree intentional homicide while armed, one count of burglary, party to the crime, and one count of being a felon in possession of a firearm. The jury convicted Brooks on all counts but one. On one count of attempted first-degree intentional homicide, the jury found Brooks guilty of the lesser included offense of recklessly endangering safety.

represented by jailhouse lawyers or to proceed *pro se* during trial; and that errors occurred during the trial, allegedly resulting from conspiracy, perjury and prosecutorial misconduct. The trial court summarily denied Brooks's motion without a hearing and Brooks appeals.

A circuit court has the discretion to summarily deny a postconviction motion "if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996) (quoting ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633 (1972)). The issue of a motion's factual sufficiency presents a question of law subject to *de novo* review by this court. *See* ***id.*** If we independently confirm the circuit court's determination of the motion's insufficiency, we then apply the deferential standard of review to determine whether the trial court's summary denial of the motion resulted from an erroneous exercise of discretion. *See* ***id.*** at 310-11, 548 N.W.2d at 53.

To establish ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance was deficient; and (2) that deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The circuit court considering a postconviction claim of ineffective assistance must initially decide whether a defendant's allegations raise a question of fact sufficient to warrant an evidentiary hearing. *See* ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994); ***State v. Washington***, 176 Wis.2d 205, 214-15, 500 N.W.2d 331, 335-36 (Ct. App. 1993); ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979).

A defendant cannot rely on conclusory allegations of ineffective assistance of counsel to secure an evidentiary hearing. *See* ***Bentley***, 201 Wis.2d at 313, 548 N.W.2d at 55. To obtain an evidentiary hearing on an ineffective assistance

of counsel claim, a defendant must allege both deficient performance and prejudice with specificity. *See id.* at 313-14, 548 N.W.2d at 55 ("[A] defendant should provide facts that allow the reviewing court to meaningfully assess his or her claim.").

Brooks's postconviction motion alleged that his trial counsel was ineffective for failing to challenge the admissibility of his confession, failing to call certain witnesses at trial, failing to present a defense, failing to impeach the State's witnesses, and failing to investigate the case before trial. We will address each contention in turn.

Brooks's contention that his trial counsel failed to challenge the admissibility of his confession is disingenuous. Trial counsel's predecessor on the case challenged the confession, arguing that it was the fruit of an illegal arrest, was coerced and was obtained in violation of the requirements of ***Miranda v. Arizona***, 384 U.S. 436 (1966). The trial court conducted an evidentiary hearing on Brooks's challenges to the admissibility of his confession. Brooks's postconviction motion alleges no specific facts or principles of law supporting his contention that his counsel's efforts to suppress the confession were ineffective within the meaning of ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (Ineffective assistance of counsel exists when counsel's performance is deficient and the deficient performance prejudices the defense.). Accordingly, we conclude that the trial court did not err in denying this claim without a hearing.

Brooks argues next that his trial counsel was ineffective for failing to call certain witnesses at trial:

> Trial attorney did refuse to call any witnesses. He never had any plans to call any witnesses, because he never put in any witness list. See record, court record in this case. I put in a witness list, but was deny [sic] that

> right by trial judge and trial counsel, witnesses who was [sic] witness to part of this case, who had personally observed part of this incident, and whose testimony would have been relevant and material to my defense.

We conclude that these conclusory allegations were inadequate as a matter of law to require the trial court to conduct an evidentiary hearing on them.

Brooks complains next that his trial counsel was ineffective for failing to mount a defense. Specifically, Brooks contends that his attorney was ineffective for failing to call Detective Kenneth McHenry, one of the two detectives who were present when Brooks gave his statement to police, and to examine him with respect to the allegation that he gave false testimony in an unrelated case at another time. We conclude that Brooks's attorney committed no error in declining to pursue this line of defense, inasmuch as Brooks could not introduce extrinsic evidence of Detective McHenry's alleged false testimony in an unrelated case under § 906.08(2) STATS.[2]

Brooks argues next that his attorney failed to impeach the State's witnesses. We conclude that Brooks's catalogue of

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[2] Section 906.08(2) STATS. provides:

> SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

errors and inconsistencies in the testimony of the State's witnesses recounts only the most trivial disagreements over the course of events during the crime and its investigation.[3] These points taken together did not add up to an adequate factual basis for the trial court to order an evidentiary hearing. As we have noted before, "[z]ero plus zero equals zero." ***State v. Marhal***, 172 Wis.2d 491, 507, 493 N.W.2d 758, 766 (Ct. App. 1992) (internal quotation marks and quoted source omitted).

Brooks also contends that his attorney did not investigate the case before trial. The record contradicts this assertion. Trial counsel's predecessor used an investigator who independently interviewed witnesses, viewed the crime scene and took photographs. This evidence was turned over to Brooks's trial attorney well in advance of trial along with the State's response to the defense's discovery requests. Brooks's attorney also engaged an investigator to assist in preparing the case. Accordingly, we conclude that the trial court properly denied this claim without a hearing as well.

We turn now to Brooks's contention that the trial court improperly denied his motion to proceed *pro se* and his motion to be represented by two jailhouse lawyers. Neither Brooks's postconviction motion nor his appellate brief explains how the trial court erred in concluding that Brooks, an inarticulate, unschooled, and disruptive individual, was not competent to represent himself in this complex trial. *See* ***State v. Klessig***, 211 Wis.2d 194, 212, 564 N.W.2d 716, 724 (1997) (setting forth the factors a trial court should consider

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[3] These trivial disagreements included, but were not limited to, whether Brooks remained in the squad car at all times when police escorted him to the scene of the crime or whether Brooks was allowed to exit the squad car at the crime scene; the precise time that Brooks's car was towed from the crime scene; and the precise time that a detective made certain entries into his memo book.

in deciding whether a defendant is competent to proceed *pro se*). Furthermore, a defendant has no right to legal representation at trial by persons who are not members of the State Bar. *See* ***State v. Olexa***, 136 Wis.2d 475, 481, 402 N.W.2d 733, 736 (Ct. App. 1987). We conclude, therefore, that Brooks's challenge to these trial court rulings lacks merit.

Brooks concludes his appeal with the argument that his conviction resulted from prosecutorial misconduct and a conspiracy involving the trial court, all of the attorneys and police officers involved in the case, as well as many others. These claims are not supported by citations to the record or authorities that permit meaningful consideration of them by this court. As the Wisconsin Supreme Court once observed, "[a]n appellate court is not a performing bear, required to dance to each and every tune played on an appeal." ***State v. Waste Management of Wis., Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978). Accordingly, we decline to address these putative claims.

In light of the foregoing discussion, this court concludes that Brooks was not entitled to relief on the errors he claims occurred before the trial court. Accordingly, we hold that the trial court did not err in its exercise of discretion when it summarily denied Brooks's postconviction motion without a hearing.

Upon the foregoing reasons.

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to RULE 809.21(1), STATS.

Appendix E

Circuit Court for Milwaukee County, Wisconsin

STATE OF WISCONSIN,

Plaintiff,

v.

EDDIE LEE BROOKS,

Defendant.

Case No. F-904061

JURY TRIAL

Reporter's Official Transcript of Proceedings

October 16, 1991

Before:

Honorable Jeffrey A. Wagner, Branch 38

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MR. BARTH: There has been nothing as to the competency to waive an attorney. However I believe that there is something as to competency

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and Mr. Brooks is competent to proceed.

THE COURT: No, I understand that. I was talking about the report that was used for the competent to proceed, but there's a different standard for competency to waive one's right to an attorney, and that's -- I'm looking for that evaluation or at least that paper or document because it might suggest something to the Court upon its reading.

MR. BARTH: Again, Your Honor, there has only been the report as to the competency. There has not been one to the competency to represent.

THE COURT: Who's got that? Or does it exist?

MR. BARTH: I do not have it with me. Do you have a copy of the report? I do not have it, Your Honor.

THE COURT: Pardon?

MR. BARTH: I do not have it with me.

THE COURT: All right. Mr. Brooks, do you understand the magnitude of the undertaking and the disadvantages of self representation?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: And what would they be?

THE DEFENDANT: Huh?

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THE COURT: And what would they be?
THE DEFENDANT: Well that I would be waiving my right to a public pretendant and be able to defend myself.
THE COURT: I know but what would be the disadvantages of self representation?
THE DEFENDANT: Well I don't know the law that good but I do know enough.
THE COURT: Pardon?
THE DEFENDANT: I don't know the law that good but I do know enough.
THE COURT: Well you don't have to know that law in order to represent yourself. It's a question whether or not you understand the nature of what your motion pertains to as far as whether or not the Court's going to grant your motion.
THE DEFENDANT: Well as to what the law be giving my right to effective assistance of counsel which I never had.
THE COURT: Are you aware of any type rules governing the conduct of the trial?
THE DEFENDANT: No, I'm not.
THE COURT: And you understand that presenting a defense is not just getting on the -- just telling your story. Do you understand that?

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THE DEFENDANT: Yes. It's asking question. Put like in a -- it's I got a right to cross examine -- right to cross examination of the witness.

THE COURT: Do you think you are skilled, sir, as to -- is better than the skill of an attorney who is well seasoned and understands the rules of evidence and knows what's objectionable and what's not objectionable?

THE DEFENDANT: No, my skill is not better than an attorney at law. But, Your Honor --

THE COURT: How do you perceive yourself to be as effectuate or as effective I should say as counsel would be?

THE DEFENDANT: Well to do a lot more than what public pretender won't do for me.

THE COURT: Don't you think it's best for yourself, best for your case to cooperate with your lawyer?

THE DEFENDANT: Cooperate?

THE COURT: And cooperate with your lawyer and assist him in your defense because of the knowledge that he has.

THE DEFENDANT: Could I cooperate with him? This man won't even investigate stuff for me.

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He refuse to give evidence to me. So how you talk about cooperate with him? He never cooperate with me. Now how is a man supposed to defend me if he refuse to investigate. We went out to the scene today. Now what you all was looking at, what you all sent people out to investigate. I been told him to investigate that fact for me. And never been done. Did just like -- I got more -- I could got better answer talking to a wall. He got a -- at least I could have got an echo.

THE COURT: Mr. Barth is very fine lawyer, sir. He's got an investigator on this case, who I'm sure has investigated the case as well as any case that's been investigated. Because you are not happy or perceive additional things that may need to be investigated, those are things to relate to your lawyer so they can possibly be investigated.

THE DEFENDANT: When I had put up this number one I wrote an affidavit of ineffective assistancy of counsel. What I stated on this is how this man would ineffective assistance of counsel for me. And I wrote public defender office in Madison trying to get something done. I wrote down here to Marcus Johnson telling this man would

not have evidence introduced for me, nor, nor would he give me certain evidence. And now he forward the letter to Michael Barth. Now how this man ineffective assistance of counselor if he won't investigate for me. And he -- or he won't give me evidence? Only thing I could think of he just join the home team.

THE COURT: Mr. Barth, you stated to the Court yesterday that you are prepared to proceed, is that correct?

MR. BARTH: Yes.

THE COURT: Completely investigated this case?

MR. BARTH: I'm sorry?

THE COURT: Completely investigated this case for the -- with the investigator?

MR. BARTH: Yes.

THE COURT: And you are prepared to go forward, are you not?

MR. BARTH: I'm prepared to whatever the Court orders.

THE COURT: State want to be heard on this issue as to whether or not the defendant is competent to voluntarily and knowingly and intelligently waive that constitutional right to

proceed pro se?

The Court based upon the colloquy that the Court's had with the defendant will be relying on Pickins versus State, State versus Clinton, Faretta versus California, and a number of other cases. Go ahead.

MR. McCANN: If it please the Court, just a number of issues that I'd like to raise for the information of the defendant and for the illumination of the Court in terms of what the Court may wish to consider in assessing this request.

One, we -- this is going to be a difficult challenge case. We will very probably -- we don't decide this until after if there's a conviction. If there is a conviction under the first degree intentional homicide charge, this occurred after the adoption of the new State statute on intentional homicide. And it will in all likelihood be the recommendation of the District Attorney's office, if there is a conviction under Count 1, that you would set his first release date far beyond the natural term of his life. In other words, we would be requesting even under Count 1 that you not release him for

parole probably until after the year 2050 when he was almost certainly, certainly be dead. We would intend to seek maximum penalties of 25 years on Count 2, consecutive to the life sentence. Maximum penalty under Count 3, which would be another 25 years, consecutive to the life sentence and the 25 years in Count 2. Maximum sentence under Count 4 which would be another 25 years which is a total of 75 years plus life in effect without parole. Plus on the armed burglary or for the burglary we would be seeking ten years consecutive. And for the felon in possession we would be seeking the maximum of two years also consecutive to all other counts.

As the Court knows we've filed also for a repeater under the repeater and will recommend the maximum or each of those counts, six years per count.

It is our intent as erstwhile as we can to seek with all our capability to remove this man from society for the rest of his natural life. We will pull no punches because he undertakes to represent himself. We will push it as aggressively as though he were represented by most skilled counsel such as Mr. Barth. There will be no easy going for this defendant. We intend to object to

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improperly phrased questions. We intend to object if he tries to testify improperly. We intend to hold him to the rules of law and the rules of evidence as we would counsel.

There will also be some sophisticated issues possibly raised. The Court has indicated that it will entertain argument on the Balcerzak matter if certain issues are filed and certain issues raised. There will be issues on the Boettcher, whether Boettcher -- what can be discussed with respect to Ms. Boettcher. We -- there may be issues -- there certainly will be ballistics, an issue on ballistics. The expertise involved to cross examine Mr. Templin who is a skilled ballistics expert.

It is my understanding that the defendant intends to claim that he didn't shoot Officer Tourmo or that's his basic approach. Our key evidence will be ballistics evidence. And the cross-examination of the ballistics expert is a formidable challenge if one hopes to be successful. And we are not going to permit improperly put questions.

There will -- there may be evidence on gunshot residue on barium and antimony and the

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effect of that. Again that is expert testimony requiring some knowledge of the chemical background. We would tend to object to keep improper matters from the jury. We intend to object if irrelevant matters are raised. And we intend to object if he giving general objections and not stating the grounds.

As the Court full well knows sometimes an improperly asked question, a skilled attorney can rephrase it properly and get the evidence in. In terms of the cross-examination is an art. We intend to present dozens of witnesses. Cross-examination is an art. Takes years of skill to acquire the art that Mr. Barth has. This defendant is somewhat inarticulate. We've heard him here in court. He is cunning I think. But in terms of articulate or persuasive orally I don't think so.

In terms of interruptions, improper interruptions we will object to that. There are times when a skilled attorney decides whether a witness can do more damage or better off to not to call the witness. The skilled decision when to ask no more questions, the question of whether the defendant himself will testify. So far the Court

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has asked as I see it several questions to which there has been not as yet any satisfactory answer.

Number one, what is this man's education. He said he got a GED at sixteen and a half. I wonder how he did in school up to that point. What if he's attempted to educate himself in the law in any other fashion. And how he did as a student. Was he a special student? Was he in a special class. Was he -- in other words, what was the level of his performance.

Secondly, he has not answered the Court's question what are the lesser included offenses. What can he petition the Court for or argue or shape the evidence as it comes in to induce the jury to opt for a lesser included offense.

So, one, I don't think he has indicated that he knows what the lesser included offenses are, and secondly, as he indicated how to shape the testimony to get it that way. The range of allowable punishment I have discussed the maximum. Of course there are below that you can follow. The life can go down to regular life which is parole in thirteen and a half years. And he could secure probation basically for the other counts.

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What are the defenses to the charge? I think the Judge -- the Court has touched on that but not put that inquiry directly to him. Not necessarily what his defense might be, but what are the defenses. And what is the -- and the Court has mentioned mitigation of the accusations but has not inquired directly, sir, what do you mean to understand by mitigation. And other general questions that would bear on his understanding.

I know the law requires not just that he's told these things but that he is -- that the evidence is an understanding of these things and before they can be really knowing, intelligent waiver.

It's been often said that a man who represents himself has a fool for a lawyer. And in this case we have an unschooled man, no real formal education apparently beyond GED. And he must be told that this is hard ball we're playing. This isn't bean bag and this isn't sport. This is his life at stake. We fully intend that he never again walk the streets of the city. We will work as skillfully as we can. We will make every effort to see that he is locked behind bars. We will yield no ground because he is not a high school graduate.

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We will in no way temper our arguments because he may be inarticulate. We will in no way blunt the thrust of our attack because of his lack of education and training. So let him be fully informed of what our intents are and the fact that we will in no way indulge this pursuit.

This is an ill-advised, unwise, tragic for him, bad decision. I am not satisfied with that he's fully literate or that he's competent to speak for himself or that he has sufficient understanding and I would urge the Court to go with those questions on defenses on mitigation and I think better we take an hour today than be confronted with -- it is no doubt the intent of the defendant to make error on this record. All of us have been -- everybody in this room has had extensive experience and knows what's afoot here and I would -- I for one would much rather take an hour now for the Court to -- as much as we're desirous of proceeding this now being the third day, I would rather much take an hour now than be debating this in the Supreme Court and through a series of habeas corpus in the Federal Court.

THE COURT: You put that very well, Mr. McCann, and the Court believes that those things

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that you have stated should be recognizable to the defendant before the Court can allow him to proceed pro se. You heard Mr. McCann, Mr. Brooks, did you not?

THE DEFENDANT: Yes, I did, Your Honor. Proper person not pro se.

THE COURT: Pardon?

THE DEFENDANT: Appearing in proper person not pro se. In fifth edition of Black Law edition would explain what I just said.

THE COURT: Well let me ask you. What are your defenses of potential defenses to the offenses that are contained in the Information?

THE DEFENDANT: Of man not guilty by necessary on that count. Michelle Boettcher not guilty because I did never fire a shot, nor Mozejewski. And as far as Tourmo go, there's a lot more to that case than what they want to admit. Just like went back out to the scene today. They think it might be holes in other places. Number one, they didn't even investigate this case good. They can't say where magic bullet and stuff. Hey, this whole case this ain't nothing but a conspiracy. That's all it is. If it's not, where is the magic bullets at. Where did my at. Went

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back out to the scene today you might find them in different place. This ain't nothing but big conspiracy and I can prove half of what I'm saying.

THE COURT: So basically one of your defenses is that there's conspiracy.

THE DEFENDANT: That's right. Because of changing everything, and doctor and everything is included. Court transcript.

THE COURT: What about any mitigating factors do you see, sir? Mr. Brooks, what about mitigating factors as far as defenses, factual basis for lesser included?

THE DEFENDANT: Well number one come down to not guilty by necessary. Not guilty by necessary. I got the right to defend myself. If people get to popping at me nine time, I'm within my right to do anything, anything to terminate that threat. As far as Mozejewski and Boettcher, I never did do that. You want me to -- like I said once before, I always take a lie detector test on anything I said.

THE COURT: You don't have any comment, Mr. Barth?

MR. BARTH: Your Honor, I did meet with Mr. Brooks at Waupun prison. I did give him a

detailed memo that discussed the elements of Count 1 of this case. In that memo I also broke down mitigating circumstances. Things that could possibly result in a conviction of a lesser included on Count 1, that being the second degree. I believe that Mr. Brooks does have the right to represent himself provided that he makes a knowing and voluntary waiver to that effect.

Mr. Brooks has been advised by Mr. McCann what Mr. McCann will seek in this matter. And that Mr. McCann will not hold back. That is one of the disadvantages of representing himself. However if Mr. Brooks understands that Mr. McCann is going to pursue this matter to the fullest extent of his abilities and that he would hold Mr. Brooks to the same standards as he would hold a licensed attorney, --

THE COURT: Well that -- Well that -- one of those things it goes to obviously the rules of evidence are going to be applicable as to anyone in this courtroom who practices.

MR. BARTH: I know that Mr. Brooks has filed numerous motions in this matter pro se.

THE DEFENDANT: Proper person.

MR. BARTH: Proper person as he puts it,

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which is the English translation I believe. That he does understand what the basis of those motions or at least believe that he has sufficient factual basis to put forth those motions.

THE COURT: Well --

MR. BARTH: I believe that he is competent to represent himself provided he fully understands what he is giving up and that is the right of a person who's well versed in the areas of the law.

THE COURT: All right.

MR. BARTH: That he must also understand that if he does proceed pro se or proper person, that should he not follow the rules of evidence or becomes disruptive, that he can be removed from his own counsel and that counsel could be inserted at that point.

I am here. I am prepared to proceed. I am prepared to proceed as either lead counsel or stand by counsel, whatever the Court desires. Should Mr. Brooks prove incapable of representing himself, I will be here to step in at that point.

THE COURT: All right. In that case law there has to be a deliberate choice. There's got to be a voluntary and knowing waiver. The Court is

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somewhat skeptical on the defendant's deliberate choice or voluntary choice as to this issue based upon the defendant's prior conduct as far as to -- as far as him trying to obstruct the process of his trial based upon his continuous motions seeking new counsel. The Court questions legitimacy as to that voluntariness based upon the prior record in this case. Quite frankly I don't -- I would perceive it and it could be perceived based upon the record that this is another ploy by this defendant based upon the prior motions that he's filed.

But let's say that it is voluntary. Then it still has to be certainly with knowledge and with an intelligent decision and certainly the awareness of the difficulties and disadvantages that may -- that may come up in the course of the trial -- and of course Mr. McCann certainly brought many of those factors out, which the Court in the following decision will certainly adopt as some findings.

I -- during my colloquy and my observation of this defendant over the last couple of days I don't believe that he's given any satisfactory answers to some of the questions that the Court has presented. Whether or not it be the

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defenses, the mitigation, whether or not there are lesser included offenses. He hasn't been very articulate -- articulate in explaining that to the Court, which goes to his knowledge or knowingly waiving that constitutional right.

This is going to be a very difficult and challenging case with a lot of different evidentiary issues. And because of the magnitude of those -- magnitude of the case that follows -- there's probably -- at least from the witness list there's a lot of expert witnesses that are going to be called to testify. And that goes to whether or not defendant has the basis based upon the record in this case, based upon his lack of educational experiences, his articulateness, whether or not he really can form the competency to knowingly waive that constitutional right. For that reason the Court's going to deny the defendant's motion. And, counsel, you can proceed with him. Let's go to opening arguments.

THE DEFENDANT: Can you move -- can you remove the bracelet off my arm so I can at least go through my legal papers?

THE COURT: I can't hear you, Mr. Brooks.

Appendix F

CONSTITUTIONAL PROVISION INVOLVED

Amendment VI to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix G

STATUTORY PROVISION INVOLVED

Title 28. Judiciary and Judicial Procedure

Part VI, Chapter 153. Habeas Corpus

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral postconviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.